

June 14, 2019

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Tomas Torres  
Director, Water Division  
United States Environmental Protection Agency, Region 9  
75 Hawthorne Street  
San Francisco, CA 94105

RE: Region 9 Oversight of National Estuary Program at Santa Monica Bay

Mr. Torres:

I represent the Ballona Wetlands Land Trust in its effort to obtain information from Region 9 of the US Environmental Protection Agency (US EPA) regarding the management of the National Estuary Program (NEP) at Santa Monica Bay. I understand that my client has submitted a Freedom of Information Act (FOIA) request to US EPA that will produce written records related to the program. The purpose of this letter is to obtain answers to specific questions that my client has been asking for over a year without a response.

My client suspects that US EPA Region 9 has neglected to follow various regulations and guidelines related to the management of our local NEP, adversely impacting both the current and future welfare of the Ballona Wetlands Ecological Reserve, a high priority ecosystem described in the NEP's Bay Restoration Plan and annual work plans. The following questions are designed to facilitate clarification of Region 9's positions on these matters.

### **Composition of Management Conference**

The question of what entities comprise the management conference of the local NEP should be a simple and straightforward one. In 1988, the State of California expressly established the Santa Monica Bay Restoration Project to serve as the Management Conference for the local NEP and, in 2002, renamed the Project as the Santa Monica Bay Restoration Commission (SMBRC), a locally-based, non-regulatory state agency. Numerous documents, including a presentation by US EPA Region 9 staff and recently submitted documents relating to an ongoing program evaluation, limit the composition of the Management Conference to various SMBRC bodies, namely the Governing Board, the Technical Advisory Committee, the Watershed Advisory Council and, according to some documents, the Executive Committee.

Yet the Bay Foundation (TBF), a private nonprofit organization, claimed in its own presentation that it is also an entity comprising the Management Conference. In fact, TBF altered a contract with a consultant hired to review SMBRC's Governance Structure in order to define the local NEP as one with a non-profit Management Conference model.

40 CFR § 35.9015 states that “EPA considers various factors to allocate among the Management Conferences the funds requested in the President's budget for the NEP. Each year, the Director of the Office of Marine and Estuarine Protection issues budgetary targets for the NEP for each Management Conference . . . Using the budgetary targets provided by EPA, each Management Conference develops Annual Work Plans describing the work to be completed during the year and identifies individual projects to be funded for the completion of such work.” (emphasis added)

By claiming itself as an entity comprising the Management Conference, as opposed to merely having an *ex officio*, non-voting seat on the Management Committee, TBF apparently seeks to justify developing the work plan in lieu of the recognized Management Conference, which has a very limited role in work plan development. In any event, this should not be a source of confusion for the public.

As such, please answer the following three questions related to this issue:

**Question 1:** Is TBF one of the entities comprising the Management Conference for the NEP at Santa Monica Bay?

**Question 2:** If yes, how and when did TBF become an entity comprising the Management Conference?

**Question 3:** What entities currently comprise the Management Conference for the NEP at Santa Monica Bay?

### **Host Entity**

TBF currently claims to be the host entity of the local NEP. From 1988 to 2008, SMBRC, and the SMBRP before it, were both fully housed within the State Water Resources Control Board (SWRCB). Up until roughly 2006, US EPA funds for NEP management went directly to SWRCB. After that period, US EPA funds were allocated by SMBRC to TBF (known as the Santa Monica Bay Restoration Foundation at the time) under an agreement in which TBF would hire personnel to serve as staff of the SMBRC to augment the two state employees provided by SWRCB. In 2008, many of the TBF-hired SMBRC staff relocated to offices on the campus of Loyola Marymount University (LMU). In 2017, the remaining TBF employees relocated from the SWRCB offices to the offices at LMU. In 2018, for the first time since TBF began hiring employees, the Fiscal Year 2019 NEP Work Plan stopped designating any TBF employees as SMBRC staff.

The designation of TBF as the host entity of the local NEP is important, as that designation comes with certain authority and also clear responsibilities. The US EPA document “Frequently Asked Questions on National Estuary Program (NEP) Governance” states that “The [Management Committee] has the ability to decide that it wants the NEP to move to a new host entity to ensure effective implementation of its CCMP.” Examples of other NEPs changing the host entity seem to have involved substantial deliberation by the NEP Management Committee and sub-committees (see for example recent changes in host entity by the New York-New Jersey Harbor & Estuary Program and Charlotte Harbor National Estuary Program).

Please answer the following five questions regarding NEP host entity rules:

**Question 4:** What entities or individuals have the authority to change the host entity of a local NEP?

**Question 5:** What entities or individuals made the determination that TBF would be the host entity for the Santa Monica Bay NEP, and when did this occur?

**Question 6:** Is the SWRCB still also a host entity of the Santa Monica Bay NEP, given that it provides office space and administrative support to the SMBRC?

**Question 7:** Are there any other NEPs for which the Management Conference is a government agency but for which a private entity claims to be the host entity?

**Question 8:** Are there any other NEPs for which a private entity claiming to be the NEP host entity is in turn hosted by another private entity?

#### **Relationship between NEP Staff and the NEP Management Conference**

As noted above, NEP staff, including the NEP director, are required by the US EPA to be seen as accountable to, and representing, the Management Conference and not the host entity, even though staff may be hired by and managed by the host entity. In the case of our local NEP, TBF employees serving as NEP staff do not appear to represent the NEP Management Conference, or to be accountable to it. There has been no confirmation that TBF employees are bound by policies set by the Management Conference. Meanwhile, in correspondence with the public and with other agencies and entities, they identify themselves as representing TBF and not the Management Conference. Of particular concern is TBF sponsored legislation that would switch administrative support for SMBRC from the SWRCB to the State Coastal Conservancy without conferring with, or even notifying SMBRC.

**Question 9:** To what extent are Santa Monica Bay NEP staff accountable to the Santa Monica Bay NEP Management Conference?

**Question 10:** Does the NEP Management Conference have the authority to direct NEP staff to implement projects described in its annual Work Plans and Bay Restoration Plan?

**Question 11:** Are there any NEPs in which the NEP staff is not bound by policies set by the NEP Management Conference?

### **Autonomy from Host Entity and Visibility in the Watershed**

US EPA's Program Evaluation Guidelines for NEPs unambiguously require that "[t]he Program office has autonomy with regard to the host entity (e.g., sets and follows its own priorities, exhibits visibility in the watershed, etc.)." TBF has attempted to satisfy the visibility component of this requirement by stating in its packet submission that "TBF is the host entity for SMBNEP" and that "TBF manages the day to day activities of SMBNEP and has visibility to the community." In this context, it appears that TBF is identifying itself as both the "host entity" and the "Program office."

TBF's representations conflicts with the requirement that the Program office be autonomous from the host entity, which can't be the case if the Program office and host entity are the same entity. To navigate that issue, TBF claims that "[t]he diversity of the Management Conference itself provides autonomy to SMBNEP as no single entity or interest group controls the direction and guidance of its publicly held decision-making processes." In this statement, TBF seems to be identifying SMBRC (i.e. the Management Conference) as the "Program office."

Please answer the following four questions on this subject:

***Question 12:*** What entity is the "Program office" for the Santa Monica Bay NEP?

***Question 13:*** Does the local NEP director and staff operate autonomously from TBF?

***Question 14:*** In what ways does SMBRC make itself visible in the watershed (i.e. press releases, events, social media)?

***Question 15:*** Why do NEP staff identify their affiliation with the host entity, instead of the Program office, in e-mails, business cards, letters and other means of communication?

***Question 16:*** Why did the Association of National Estuary Programs replace the SMBRC name and logo with TBF's name and logo on its website?

### **Allocation and Accountability of Section 320 Funding**

As noted above, both 40 CFR § 35.9015 and 40 CFR § 35.9065 expressly designate the role of the NEP Management Conference in not merely approving Annual NEP Work Plans developed by potential fund recipients, but actually developing NEP Work Plans. Nevertheless, the role of the NEP Management Conference seems to have become largely ceremonial.

Additionally, § 35.9065(a) states that "The Regional Administrator will not award funds pursuant to CWA section 320(g) to any applicant unless and until the scope of work and overall budget have been approved by the Management Conference of the estuary for which the work is proposed."

**Question 17:** What entity leads the development of the Annual Work Plans?

**Question 18:** Did the Management Conference authorize TBF to increase the budget, from \$15,000 to roughly \$24,000, to retain the services of a facilitator to assist in the evaluation of the structure of SMBRC?

**Question 19:** Did the Management Conference authorize TBF to change the deliverables promised to the Management Conference for that project, as outlined in the published RFP?

**Question 20:** Did the Management Conference authorize TBF to amend the contract with this facilitator to narrow its research on other NEPs to those with “non-profit Management Conference models?”

**Question 21:** Have any Section 320 funds been spent by TBF to advocate for Assembly Bill 1511, which impacts the SMBRC? (Note: this would include work time spent TBF’s Executive Director, Governmental Affairs Consultant, or other staff, unless that time was directly funded by a separate, identifiable source.)

**Question 22:** Is it permissible for Section 320 funds to be used to lobby for state legislation?

### **Public Participation**

Public participation is a central component of the National Estuary Program. Yet at the Santa Monica Bay NEP, public participation is limited to the bare minimum required by law. The Program Evaluation submission by TBF disingenuously lists multiple elements of public participation that were brought about by stakeholders and opposed by TBF, and/or which TBF treats as a nuisance. To say the public participates in the NEP via public comment or e-mails to the Governing Board is an empty assertion given that responses to these written and verbal comments is typically limited to legally required responses.

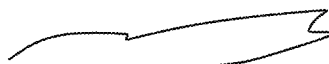
**Question 23:** Why are all TBF’s Board of Directors meetings not open to public?

**Question 24:** Why has Region 9 made no effort to inform stakeholders of its initial findings for the Program Evaluation, despite numerous requests by the public?

**Question 25:** Why does SMBRC refuse to convene special committees or Work Groups to increase public participation in matters of high public interest in a manner that doesn’t consume the limited time of the full Governing Board?

The questions asked in this letter should not be difficult to answer. Providing clarity on these issues is in the interest of all parties. Please do not hesitate to contact me if you have any questions or comments. Otherwise, I look forward to hearing back from US EPA Region 9 and receiving the information my client has long sought.

Sincerely,



Peter Borenstein, Esq.  
Ballona Wetlands Land Trust